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No. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), *et al.*,
Petitioners,

v.

PAUL E. SCOTT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY BRIEF

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1. In the petition (at p. 9) we: argued that the "holding [in this case] that [42 U.S.C.] § 1985(3) is applicable although the objective of the conspiracy does not encompass governmental interference with the plaintiff's associational freedom is squarely contrary to Judge (now Justice) Stevens' reading of § 1985(3) in *Dombrowski v. Dowling*, 459 F.2d 190 (C.A. 7) (*'Dowling'*)"; noted that the court below had *acknowledged* a conflict between its reading of § 1985(3) and that of the Seventh and Fourth Circuits (Pet. 10); and added that on this question the Eighth Circuit is aligned with the Fifth Circuit and the First Circuit is aligned with the Seventh and Fourth Circuits (Pet. 10).

The brief in opposition (at p. 9) responds that "there is no clear and substantial conflict among the circuit courts on the issue of state action" (heading; first letter capitals omitted). After a discussion of why Respondents believe *Dowling* to be "plainly inconsistent" with *Griffin v. Breckenridge*, 403 U.S. 88 (Br. in Opp. 9-11; compare Pet. 1a-3a), the "no clear and substantial conflict" argument is developed in three paragraphs, none of which, as we now show, provide support for that argument.

In the first of these paragraphs Respondents state:

> Petitioners are clearly mistaken in their assertion that *Dowling* represents the majority view from which the decision below is a deviation. To the contrary, the Seventh Circuit stands virtually alone in its extremely restrictive view of the meaning of § 1985(3), and even the Seventh Circuit has not been entirely consistent in this view. *Compare Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 829-30 n.33 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (§ 1985(3) action may not require state action where first amendment rights are involved) *with Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976) (rejecting the *Cohen* view). *See also Dear v. Rathje*, 391 F. Supp. 1, 8 (N.D. Ill. 1975), *aff'd mem.*, 532 F.2d 756 (7th Cir. 1976) and *Franceschina v. Morgan*, 346 F. Supp. 833 (S.D. Ind. 1972) (conspiracies to violate fourteenth amendment rights actionable without state involvement). [Br. in Opp. 11.]

But Judge Stevens' *Cohen* opinion is entirely *consistent* with his *Dowling* opinion: "[W]e remain convinced that our reasoning in *Dombrowski* [*v. Dowling*] is a correct explanation of why the statute does not broadly 'apply to all tortious, conspiratorial interferences with the rights of others.'" (*Cohen*, 524 F.2d at 829.) To be sure, that sentence is followed by a careful caveat: "We have not been faced with the question whether the *Dombrowski* [*v. Dowling*] rationale would apply to a right protected

by the First Amendment which in terms is only a protection against State action, but which is often accorded special deference." (*Cohen*, 524 F.2d at 829-830 n.33.) But, as even Respondents recognize, when the Seventh Circuit thereafter faced that open question in *Murphy v. Mount Carmel High School*, the answer was that the *Dowling* rule *does* apply to such Fourteenth Amendment claims. And not even Respondents contend that since the *Murphy* decision there has been any "inconsistency" in the Seventh Circuit decisions.

With regard to the Fourth Circuit law, Respondents recite:

> Petitioners also erroneously state that the Fourth Circuit is in accord with *Dowling*. To the contrary is *Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1253 (1982)—a recent decision cited by the court below but ignored by Petitioners—which distinguished the case relied on by Petitioners. The Fourth Circuit has now squarely adopted the majority view. [Br. in Opp. 11.]

This is what the pertinent portion of the *Ward* opinion says:

> Having concluded that Ward's complaint satisfies the requisite elements of a § 1985(c) cause of action, it is, of course, necessary that we identify a source of congressional power to reach the alleged conspiracy. The *Griffin* Court found such power in § 2 of the Thirteenth Amendment as well as the right of interstate travel which the Court recognized was "among the rights and privileges of National citizenship." *Id.*, 403 U.S. at 106, 91 S. Ct. at 1800. Since Ward is not a member of the Negro race, congressional authority cannot be based on the Thirteenth Amendment. However, the complaint clearly charges that a purpose of the conspiracy was to prevent Ward from traveling from state to state and that the conspirators did, in fact, interfere with Ward's consti-

tutional right,[5] and this is sufficient to support his cause of action.

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[5] Since we find congressional authority to reach the conspiracy under Ward's right of interstate travel, it is unnecessary for us to consider the troublesome question of congressional power under § 5 of the Fourteenth Amendment which confronted us in *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4 Cir. 1974).

[657 F.2d at 48.]

Plainly *Ward's* holding is *not* "to the contrary" of *Dowling's* or of *Bellamy's*. (See Pet. 9-10, 2a.) Nor can the *Ward* Court's determination to decide that case on "right to travel" grounds or its fair characterization of the question presented here as "troublesome" possibly be taken to signify an overruling of *Bellamy*.

Finally, Respondents contend that eleven cited cases "hold[] that § 1985(3) is applicable in proper circumstances to private conspiracies interfering with rights or interests protected by the fourteenth amendment." (Br. in Opp. 11-12.) As the carefully guarded phrasing ("in proper circumstances") suggests, those cases do not on inspection support Respondent's "no clear and substantial conflict" thesis.

Five of the cited decisions are obviously beside the point: two are Eighth Circuit decisions, and we recognized in our petition that the Eighth Circuit's position is the same as the Fifth Circuit's;[1] two are cases in which *public officials* allegedly participated in the conspiracy;[2] and one involves an alleged conspiracy to secure *governmental interferences* with the plaintiff's Fourteenth Amendment rights.[3] Five others are reversals of judg-

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[1] *Means v. Wilson*, 522 F.2d 833 (C.A. 8), *cert. den.*, 424 U.S. 958; *Action v. Gannon*, 450 F.2d 1127 (C.A. 8) (en banc).

[2] *Glasson v. City of Louisville*, 518 F.2d 899 (C.A. 6), *cert. den.*, 423 U.S. 930; *Cameron v. Brock*, 473 F.2d 608 (C.A. 6).

[3] *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 885 (C.A. 9).

ments for defendants in which the district court had ruled that the plaintiffs were required to show government involvement in the alleged conspiracy and a resulting *remand* for further proceedings; none recognize much less address the point made in *Dowling*—that to come within § 1985(3) private conspiracies to deprive the plaintiffs of a Fourteenth Amendment right must be directed at securing government interference with that right.[4] We do not believe that these interlocutory rulings by their silence add to the substance of the dialogue between the Courts of Appeals on the soundness of the *Dowling* rationale. The facts of those cases do, however, indicate the variety of minor local disputes cognizable under state law that would, under the Fifth and Eighth Circuits' reading of § 1985(3), be transmuted into federal causes of action; this consequence supports our contention that the issue as to the scope of the federal courts § 1985(3) jurisdiction we raise is an important one. One of the eleven cited cases, *Life Ins. Co. of North America v. Reichardt*, 591 F.2d 499 (C.A. 9), does recognize the conflict between the Seventh and Eighth Circuits and apparently agrees with the *Dowling* analysis with regard to Fourteenth Amendment clams. (See 591 F.2d at 504.) But *Reichardt* holds that where a *state law* "prohibits the private discrimination alleged", the plaintiff "has a state right or entitlement to be free from the alleged private discrimination" and on that basis a derivative § 1985(3) claim. (*Id.* at 504-505.) That approach is different both from that of the Fifth and Eighth Circuits and from that of the Seventh, Fourth and First Circuits. *Reichardt* thus provides added support for our contention that in light of the circuit conflict we have outlined it is now timely for this Court to clarify the extent to which § 1985(3) covers private conspiracies.

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[4] *Weise v. Syracuse University*, 522 F.2d 397, 408 (C.A. 2); *Richardson v. Miller*, 446 F.2d 1247, 1249 (C.A. 3); *Marlowe v. Fisher Body*, 489 F.2d 1057, 1064-65 (C.A. 6); *Romero v. Union Pacific Railroad*, 615 F.2d 1303, 1312 (C.A. 10); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 931 (C.A. 10).

2. So far as one can tell from its opinion, the majority below defined the class-based animus here as animus directed at "nonunion workers who are attacked for their choice to associate with other nonunion workers thereby enabling an employer to offer significant work to the class * * *." (Pet. App. A-18.) That choice is labeled one of "economic association" (*id.*), and the associational right thus defined in the Fifth Circuit evidently has nothing to do with whether the members of the class of "nonunion workers" are union members or not; for as Respondents note "some of Cross' employees [here] were union members" (Br. in Opp. 15, n.5 cont.). Respondents contend, contrary to our submission (Pet. 11-13), that the Fifth Circuit's approach to what constitutes class-based animus actionable under § 1985(3) just outlined is consistent with that of the Sixth and Tenth Circuits in that:

> [A]ll courts appear to agree with the court below that discrimination on the basis of beliefs or associations may constitute "class-based" animus for the purposes of § 1985(3). Far from being divergent (Pet. 11), the decisions consistently interpret the class-based discrimination requirement to mean that the class must share common characteristics or beliefs and that the conspiracy must have been directed against class members because of those characteristics or beliefs, not, *post hoc*, because the members are all victims of Defendants' conduct. *See, e.g.*, the cases cited by the court below, 680 F.2d at 992. *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980) and *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981), relied on by Petitioners, are not to the contrary, but in fact state and apply the same criteria stated and applied by the court below. [Br. in Opp. 13.]

But Judge Merritt's opinion in *Browder* makes it plain that the Sixth Circuit did not, as Respondents would have it, "h[o]ld *on the facts* that plaintiffs were not the victims of a class-based animus within the meaning of *Griffin*"

(Br. in Opp. 13-14; emphasis added). Rather *Browder* held that class-based animus based on a form of economic association indistinguishable from that here (associating to do work that involves crossing a picket line) does not come within § 1985(3) at all:

> Thus, plaintiffs' class is simply one of picket line crossers. No matter how "invidious" any discrimination against this class may be, the right to cross a picket line is no more constitutionally protected than is the right to be an unpopular barn owner. [630 F.2d at 1154, quoted at Pet. 12 n.7.]

Nor can *Silkwood* be distinguished from the instant case on the facts. The Tenth Circuit there upheld the dismissal for failure to state a cause of action of a complaint alleging a conspiracy against the plaintiff to deprive her "and other employees who were engaged in organizing a labor union of the equal protection and enjoyment of the laws of the United States" (637 F.2d at 746 quoted at Pet. 12). Unless working under nonunion conditions enjoys a higher status than working under union conditions, the instant case and *Silkwood* cannot be reconciled.

? Respondents entire response to our showing of a conflict on § 1985(3) standing to sue between the decision below and *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (C.A. 9), *cert. denied*, 454 U.S. 967, is:

> The correctness of the decision of the court below—that a person injured by a conspiracy motivated by class-based animus may sue under § 1985(3) even though not a member of the relevant class—would seem beyond dispute. It is supported not only by the plain language of the statute, but also by this Court's decisions in *Griffin* and [*Great American Fed. S. & L. Assn. v.*] *Novotny*. [Br. in Opp. at 15-16.]

But the standing question was not raised or discussed in *Griffin* or in *Novotny* (442 U.S. 316). And neither the

Ninth Circuit in deciding *Caulis* nor this Court in denying the petition for certiorari there were of the view that *Griffin* and *Novotny* compel the result reached below. There is in short a real and substantial conflict in the circuits on the § 1985(3) standing question.

CONCLUSION

For the above-stated reasons, as well as those stated in the petition for a writ of certiorari, that petition should be granted.

Respectfully submitted,

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